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Stotts v. Memphis Fire Department, 679 F.2d 541 (6th Cir. 1982), cert. granted, 51 U.S.L.W. 3871 (U.S. June 7, 1983) (No. 82-229)

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CASE NOTES

Constitutional Law-Civil Rights—THE SIXTH CIRCUIT HOLDS THAT JUDICIALLY IMPOSED RACIAL QUOTAS TAKE PRECEDENCE OVER A SENIORITY SYSTEM—*Stotts v. Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3871 (U.S. June 7, 1983) (No. 82-229)

I. INTRODUCTION

Racial discrimination has plagued America throughout most of its history. It was not until the 1960's that the federal government began to take serious action in pursuit of civil rights for minorities. In perhaps the most significant and needed piece of legislation in this century, Congress prohibited racial discrimination with the Civil Rights Act of 1964.[1] Portions of this Act prohibited employers from practicing discrimination in the hiring and promoting of employees.

At the time this legislation was being considered, many members of Congress were concerned about the effect it would have on seniority systems. The "last hired, first fired" seniority system was, and still is, one of the foundations of American unionism. To alleviate this concern, Congress enacted section 703(h) of title VII of the Civil Rights Act of 1964[2] as an exception to the general prohibition against discrimination. Even if a seniority system as implemented had willfully discriminated in the past, section 703(h) was intended to immunize such a system from challenge. This was the result even if the system had a disproportionately adverse impact on minorities[3] or operated to perpetuate past employment discrimination.[4]

Congress was also concerned about the scope of a court's remedial powers. Whether this legislation would authorize courts to impose racial quotas or goals[5] was the subject of a lengthy debate. Finally, Congress defined the limitations of judicial remedial pow-

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1. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended under various titles of U.S.C. (1976)).

2. 42 U.S.C. § 2000e-2(h) (1976). *See infra* note 53.

3. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 348-56 (1977).

4. *See* United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

5. The terms "quota", "goal" and "racial preference" are synonymous and will be used interchangeably throughout this note. These terms describe a court order which mandates that an employer hire and/or promote members of various racial classes in a specified ratio to achieve a "racial balance."

ers by enacting section 706(g) of title VII.[6]

The Supreme Court's interpretation of the history and purpose of section 703(h) and section 706(g) will undoubtedly be determinative in its upcoming *Memphis Fire Department v. Stotts*[7] decision. These two sections are crucial because the fire department and the labor union will be arguing that, under section 706(g), the *Stotts* district court did not have the authority to grant the remedial relief that it did. Even assuming the court had such authority, they will argue that the relief was improper because of the immunity granted under section 703(h). The minority firefighters, on the other hand, will be arguing that section 706(g) does give the district court such authority and that remedial relief was proper even in light of section 703(h). This note will first state the facts of *Stotts* and then will examine how Congress designed, and how the Supreme Court has interpreted, these sections.

II. HISTORY OF *Stotts v. Memphis Fire Department*

In 1974, the United States Department of Justice instituted an action against the City of Memphis under title VII which alleged that the fire department had engaged in a pattern or practice of racial and sexual discrimination in hiring and promoting.[8] The city initially denied the allegations but later agreed to settle the litigation with a consent decree [hereinafter referred to as the "1974 decree"].[9]

In the 1974 decree, the city specifically denied that it had engaged in any pattern or practice of discrimination. The 1974 decree provided that its entry did not constitute an adjudication on the merits of the allegations nor an admission by the city of any violation of law. However, the city did acknowledge that its past employment practices may have created an inference of racial and sexual discrimination.[10]

The purpose of the 1974 decree was to remedy any disadvantage to blacks and women which may have resulted from past discrimination. Subject only to the availability of qualified applicants, the

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6. 42 U.S.C. § 2000e-5(g) (1976). *See infra* notes 23 & 50.

7. 679 F.2d 541 (6th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3871 (U.S. June 7, 1983) (No. 82-229).

8. *Id.* at 546-47. The city was also alleged to have violated 42 U.S.C. § 1981 (1976), the fourteenth amendment and the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§ 1221-1265 (1976).

9. *Stotts*, 679 F.2d at 547, 570-73 app.

10. *Id.* at 547, 570-71 app.

city agreed to achieve a long-term goal of increased minority representation in each job classification at levels approximating the level of minority representation in the Shelby County labor force. The 1974 decree provided for filling at least fifty percent of all vacancies with qualified minority applicants. While no specific numerical goals for promotion of minorities above the rank of firefighter were established, the city did commit itself to making significant progress in this area. The 1974 decree also specified that the city was obligated to utilize a city-wide seniority system in the promotion of qualified minorities.[11]

On February 16, 1977, Carl Stotts, a black employee of the Memphis Fire Department, filed a class action suit alleging that the city had maintained racially discriminatory hiring and promotional practices.[12] On June 19, 1979, Fred L. Jones, another black employee, filed an individual action alleging that he had been denied a promotion solely because of his race. These two cases were consolidated in September of 1979.[13]

On April 25, 1980, the parties reached a settlement which applied to all class members. This consent decree [hereinafter referred to as the "1980 decree"] was explicitly entered into in an effort to avoid the delay and expense of contested litigation and to ensure that any disadvantage to minorities that may have resulted from the city's past hiring and promotional practices would be remedied. By entering into the 1980 decree, the city specifically did not admit to any violations of law alleged by the minority firefighters.[14] The 1980 decree specified that fifty percent of all open positions and twenty percent of all promotional vacancies must be filled by qualified minorities. In addition, the 1980 decree provided for certain promotions, and an award of $60,000 of back pay to named individuals. *However, no award of retroactive seniority was granted to any class member.* The 1980 decree, like the 1974 decree, was silent with respect to layoffs or reductions in rank.[15]

Because of a decrease in tax revenues and an increase in operating costs, the city was faced with a substantial projected deficit for the 1981-82 fiscal year. On May 4, 1981, the city announced a per-

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11. *Id.* at 572 app.

12. *Id.* at 542. Stotts charged that the city had violated title VII, 42 U.S.C. §§ 1981, 1983, 2000e-h (1976).

13. *Stotts*, 679 F.2d at 547.

14. *Id.* at 574 app.

15. *Id.* at 548, 573 app.

sonnel reduction in nonessential services in all divisions of the city government to eliminate the projected deficit. The proposed layoffs were the first in the city's history, and its layoff policy was based on an individual's city-wide union seniority (i.e., the length of his tenure as a city employee). This seniority system was mentioned in the 1974 decree and was incorporated into the city's memorandum of understanding with Local 1784 of the International Association of Fire Fighters [hereinafter referred to as the "Union"].[16]

Under the layoff policy, certain employees whose positions were being eliminated possessed "bumping" rights whereby employees with sufficient seniority could choose to assume a lower position rather than go on layoff status. In turn, employees who were "bumped" could exercise their own seniority rights with the result that the least senior employees were laid off. Most minorities had accrued little seniority in their respective ranks, and consequently nearly sixty percent of all firefighters affected by the demotions would have been minorities.[17]

On May 4, 1981, Stotts and his class of minority employees obtained a temporary restraining order enjoining the city from laying off or reducing in rank any minority employee in the Memphis Fire Department. An evidentiary hearing was held on May 8, 1981, in which the court ruled that the layoff policy would have a discriminatory impact and that the seniority system was non-bona fide.[18] In addition, the court found that although neither the 1974 or 1980 decrees contemplated a method to be used for layoffs or reductions in rank, it did possess the authority to modify the 1980 decree by restraining the city from implementing the proposed layoff policy. Subsequently, the court modified the 1980 decree and enjoined the city from applying a layoff policy which would have the effect of decreasing the percentage of minorities employed by the fire department.[19] As a result, nonminority firefighters with seniority were laid off instead of junior minorities. The city and union ap-

16. *Id.* at 549.

17. Fifty-five percent of all minority lieutenants and forty-six percent of all minority drivers would either have been laid off or demoted if the announced cutbacks had occurred. *Id.* at 549-50.

18. A non-bona fide seniority system is one in which invidious discrimination motivated the adoption, negotiation or maintenance of the system. *See* Note, *Teamsters, California Brewers, and Beyond: Seniority Systems and Allocation of the Burden of Proving Bona Fides*, 54 ST. JOHN'S L. REV. 706, 719 (1980). Because the certified question and the Sixth Circuit's decision both assume that the city's seniority system was bona fide, this note will not discuss that point.

19. *Stotts*, 679 F.2d at 550-51.

pealed this ruling.

The Sixth Circuit held that the district court had: 1) erred in ruling that the seniority system was non-bona fide, and 2) properly exercised its authority to modify a consent decree in order to prevent fiscally motivated layoffs from reducing the proportion of minority firefighters employed by the fire department, even though the modification conflicted with a bona fide seniority system.[20] Again, the city and union appealed. Certiorari was granted by the Supreme Court on the following question:

> Did [the] court have [the] authority to modify [a] consent decree between [a] municipal employer and [a] class of black employees by enjoining application of [a] layoff policy that is based upon [a] bona fide seniority system and by requiring layoffs to be based upon racial considerations, where [the] consent decree is silent with respect to the method to be used for layoffs and where there has not been any judicial finding of racial discrimination?[21]

III. Analysis of The Remedial Order

In *Stotts*, as in any title VII discrimination case, quota remedies will have a distinct impact upon the parties involved. Any court-ordered quota will either benefit, burden, or have no effect on each of the following four classes:

1) *Wrongdoer-Employer*—The government entity or company which had engaged in unlawful discrimination;

2) *Victim*—The minority who had been unlawfully discriminated against in the past;

3) *Nonvictim Beneficiary*—The minority who has never been discriminated against by the wrongdoer-employer and who is being given a promotion, having a job preserved, etc., as a result of a court-ordered quota; and

4) *Innocent Incumbent*—The nonminority employee who has never committed an act of discrimination and who is being laid off, denied a promotion, etc.

The effect which the *Stotts* district court's 1981 modification of the 1980 decree has on each of the above mentioned classes is as follows:

1) *Wrongdoer-Employer*—With the exception of an award of

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20. *Id.* at 541.

21. *Stotts*, 51 U.S.L.W. at 3871.

$60,000 for back pay in 1980, the city has not borne any burden for its alleged discrimination.[22] The city requires that its fire department have a certain number of employees. As long as each firefighter is qualified (which in this case every minority firefighter is), the city is indifferent as to whether the racial mix of its employees is 50-50, 75-25, or 95-5. From a moral standpoint, the city might be concerned about the racial mix; from an operational or financial standpoint, it is not.

2) *Victim*—Since the 1981 modification of the 1980 decree makes no attempt to identify and directly help the victims of the wrongdoer-employer's alleged discrimination, the modification will not affect this class. Similarly, neither the 1974 nor the 1980 decrees attempted to identify and help the victims of the city's alleged discrimination.

3) *Nonvictim Beneficiary*—This class of employees is receiving a remedial benefit—their jobs and promotions are preserved—for a wrong they never suffered. They may have been discriminated against by other wrongdoer-employers, but the city, by hiring and promoting them, has never committed an act of discrimination against them.

4) *Innocent Incumbent*—Although these nonminorities have never committed an act of discrimination, they are the ones who are bearing the full burden of the wrongdoer-employer's alleged discrimination by being required to sacrifice their jobs.

Under this system, the wrongdoer-employer and the victims are neither punished nor helped by the district court's remedial order. Instead, the main impact of the quota decree is upon classes of employees not involved in the alleged discrimination. The Sixth Circuit, along with other courts, however, has apparently not adopted this type of analysis.

IV. LEGISLATIVE HISTORY OF TITLE VII

A. *Section 706(g)*

The focus of congressional debate over section 706(g)[23] was

22. There were never any judicial proceedings that proved that the city had unlawfully discriminated against minority firefighters and the city specifically stated in both the 1974 and 1980 decrees that it had not violated any law. *See supra* notes 10 & 14 and accompanying text.

23. Section 706(g) provides, in pertinent part, that:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the

whether this section mandated judicial victim-specific rather than quota remedies for violations of title VII. A victim-specific remedy is one in which the actual victims of discrimination are awarded backpay, ordered to be hired or reinstated, etc. A quota remedy is one in which the wrongdoer-employer is ordered to hire or promote a specified percentage of minorities based solely on the fact that they are members of a minority group; no determination is made that they were actually victims of the wrongdoer-employer's discrimination. Opponents of title VII claimed that section 706(g) would give courts the authority to impose quotas while supporters stated that quotas would be prohibited and that only victim-specific remedies would be permitted. An argument *against* quota remedies is an argument *for* victim-specific remedies.

The bill that Congress ultimately enacted as the Civil Rights Act of 1964 began as H.R. 7152.[24] When this resolution emerged from committee, it was accompanied by a separate minority report authored by committee members who opposed it.[25] In that report, the opponents raised a charge against the bill that was reiterated throughout the ensuing congressional debates—that under title VII federal courts would impose quotas to "racially balance" workforces. To demonstrate how it was expected that title VII would operate in practice, the minority report posited hypothetical employment situations, concluding in each example that, if the employer's workforce is not racially balanced, "he must employ the person of that race which, by ratio, is next up."[26] Supporters of the Act repeatedly answered that title VII would not permit judicial imposition of racial quotas.

In introducing H.R. 7152 on the House floor, Representative Celler, Chairman of the Judiciary Committee and floor manager of the bill, addressed these charges, stating unambiguously that neither the Equal Employment Opportunity Commission (EEOC) nor the courts would have authority to order quotas or other racial

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court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include, but is not limited to, . . . hiring of employees, *with or without* back pay, . . . or any other equitable relief as the court deems appropriate. . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against *shall* operate to reduce the back pay otherwise allowable.

42 U.S.C. § 2000e-5(g) (1976) (emphasis added).

24. H.R. 7152, 88th Cong., 1st Sess., 110 CONG. REC. 6565 (1964).

25. H.R. REP. No. 914, 88th Cong., 1st Sess. 1, 62 (minority report), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2431.

26. *Id.* at 72-73, 1964 U.S. CODE CONG. & AD. NEWS at 2441.

preferences:

> *Even* [upon proof of discrimination,] *the court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end to discrimination.* The statement that a Federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous.[27]

Representative Celler's understanding of title VII was repeated by other supporters during the House debate.[28] Subsequent to passage of the bill in the House, Republican members of the House Judiciary Committee published in the Congressional Record a comprehensive interpretive memorandum dealing with the bill.[29] With respect to judicial remedies, the report stated:

> Upon conclusion of the trial, the Federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, title VII *does not permit the ordering of racial quotas* in businesses or unions.[30]

The Senate's longest debate began after H.R. 7152 passed the House. Opponents of title VII in the Senate quickly echoed the charge made by their counterparts in the House—that federal courts would enforce the provisions of title VII by imposing quotas and other forms of preferential treatment.[31] The bill's floor managers, Senators Humphrey and Kuchel, were the first to respond to this criticism. In the opening speech of the floor debate, Senator Humphrey stated: "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title."[32]

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27. 110 CONG. REC. 1518 (1964) (statement of Rep. Celler) (emphasis added).

28. *See id.* at 1540 (statement of Rep. Lindsey) (title VII does not impose quotas or any special privileges); *id.* at 1600 (statement of Rep. Minish).

29. *Id.* at 6565-66.

30. *Id.* at 6566 (emphasis added).

31. *See id.* at 4764 (statements of Sen. Ervin and Sen. Hill); *id.* at 5092, 7418-20 (statement of Sen. Robertson); *id.* at 8500 (statement of Sen. Smathers); *id.* at 9034-35 (statements of Sen. Stennis and Sen. Tower).

32. *Id.* at 6549 (statement of Sen. Humphrey).

Senator Kuchel was equally clear in his understanding that title VII's remedial provisions would not permit affirmative equitable relief in favor of individuals whose rights were not violated by an employer.

> [T]he important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the court cannot order *preferential* hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.[33]

A few days later, in an interpretative memorandum, Senators Clark and Case, the bipartisan "captains" for title VII, reiterated the points made earlier by Senator Humphrey regarding the congruence of title VII rights and remedies.[34] Although it was acknowledged that courts did have the discretion to order affirmative relief, it was stated:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for *anyone who was not discriminated against in violation of this title.* This is stated expressly in the last sentence of [section 706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex, or national origin.[35]

The Clark-Case memorandum, like Senator Humphrey's earlier remarks, states that title VII remedies were intended to be victim-specific. The supporters of title VII assured their colleagues, and

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33. *Id.* at 6563 (statement of Sen. Kuchel) (emphasis added).

34. *Id.* at 7212 (interpretative memorandum of H.R. 7152 submitted jointly by Sen. Clark and Sen. Case). The Supreme Court has characterized the Clark-Case memorandum as one of the "authoritative indicators" of the legislative intent underlying title VII. American Tobacco Co. v. Patterson, 456 U.S. 63, 73 (1982).

35. 110 CONG. REC. at 7214 (emphasis added). During the debates, the principal Senate sponsors prepared and delivered a daily Bipartisan Civil Rights Newsletter. The edition published two days after the debate began, declared: "Under title VII, *not even a court . . . could order racial quotas* or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title." Bipartisan Civil Rights Newsletter No. 28, *reprinted in* 110 CONG. REC. 14,465 (1964) (emphasis added).

the country, that racial quotas could not be imposed by the courts.[36]

B. 1972 Amendments to Section 706(g)

The Equal Employment Opportunity Act of 1972 amended title VII in several respects. Essentially, the 1972 amendments broadened title VII's coverage and granted the EEOC authority to investigate charges and to bring suits in federal court. Section 703 was left unaltered, and the only relevant change made in section 706(g) was the addition to its first sentence of the following underscored language: "[S]uch affirmative action as may be appropriate, which may include, *but is not limited to,* reinstatement or hiring of employees, with or without back pay . . . *or any other equitable relief as the court deems appropriate.*"[37]

The modifications of section 706(g) had their origin in an amendment introduced by Senator Dominick. The purpose of this added language was not explained, or even discussed, by Senator Dominick or anyone else during the debate. The amended provision was discussed, however, in a section-by-section analysis prepared by the floor manager of the legislation, Senator Williams, Chairman of the Labor Committee. According to Senator Williams' analysis:

> The provisions of this subsection are intended to give the courts wide discretion [in] exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that *the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole,* and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also *requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a posi-*

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36. "[T]he consensus among the Act's proponents emerges clearly from these debates; there is little doubt that compulsory [racial] 'balancing,' even when imposed upon an employer or union that had discriminated in the past, was not a measure available to the courts under section 706(g). . . ." Note, *Preferential Relief Under Title VII,* 65 VA. L. REV. 729, 738 (1979).

37. 42 U.S.C § 2000e-5(g) (1976) (emphasis added). The Supreme Court interpreted the "extensive legislative history underlying the 1972 amendments," including addition of "the phrase speaking to 'other equitable relief' in section 706(g)," as indicating "that 'rightful place' was the intended objective of [t]itle VII and the relief accorded thereunder." Franks v. Bowman Transp. Co., 424 U.S. 747, 764 n.21 (1976).

tion where they would have been were it not for the unlawful discrimination.[38]

A victim being "restored to a position" is a victim-specific remedy.

The 1972 amendments were introduced in the House by Representative Hawkins. His bill was designed, among other things, to give the EEOC "cease and desist" powers and to transfer the administration of Executive Order No. 11,246 from the Labor Department's Office of Federal Contract Compliance (OFCC) to the EEOC.[39] Because the OFCC had imposed quotas in its enforcement of the Executive Order, many Congressmen feared that the bill would confer on the EEOC authority to order employment quotas.

Representative Dent, the bill's floor manager, proposed an amendment that "would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program."[40] The amendment did not address the remedial power of courts under title VII because, according to Representative Dent, "[s]uch a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII."[41] During the ensuing debate, Representative Hawkins stated: "Some say that this bill seeks to establish quotas. . . . Not only does title VII prohibit this, but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated against in employment."[42] Hawkins then acknowledged his support for the Dent amendment and reiterated his belief that title VII already prohibited the establishment of quotas.

The House ultimately passed a substitute bill that left administration of the Executive Order with the OFCC, and the Dent amendment never came to a vote. The House debate indicates a consensus that title VII does not and should not permit courts to

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38. 118 CONG. REC. 7166, 7168 (1972) (section-by-section analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972, submitted jointly by Sen. Javits and Sen. Williams) (emphasis added). In *Franks*, the Supreme Court interpreted this passage to be an "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination." 424 U.S. at 764.

39. H.R. 1746, 92d Cong., 1st Sess. (1971), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 29 (1972) [hereinafter cited as LEGISLATIVE HISTORY].

40. 117 CONG. REC. at 31,784 (statement of Rep. Dent).

41. *Id.*

42. *Id.* at 31,963 (statement of Rep. Hawkins).

order quotas, but only victim-specific remedies.

The Senate debate, however, reflected no such consensus. A strong argument can be made that the Senate implicitly approved the judicial imposition of quotas. Senator Ervin proposed an amendment which would have prohibited any "department, agency, or officer of the United States" from requiring employers "to practice discrimination in reverse by employing persons of a particular race . . . in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges."[43] The Ervin amendment was defeated and some courts have inferred congressional intent from the combination of this unsuccessful amendment[44] and the following general statement made in the introduction to the section-by-section analysis of the 1972 amendments: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of [t]itle VII."[45] Since court decisions ordering quotas had been published before 1972, and two of these cases were cited by Senator Javits in his opposition to the Ervin Amendment,[46] this analysis could be read as an endorsement of quota remedies.

This argument, however, is weakened by the fact that the portion of the section-by-section analysis discussing section 706(g) expressly acknowledged that "[i]n dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the *victims* of unlawful discrimination whole."[47] Moreover, the House and Senate passed two differing versions of section 706(g). The House bill[48] left the 1964

43. S. 2515, 92d Cong., 2d Sess. (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 39, at 1017.

44. Three appellate decisions have concluded that the 1972 Congress approved of the judicial imposition of quotas in title VII cases. *See* EEOC v. American Tel. & Tel., 556 F.2d 167, 177 (3d Cir. 1977); United States v. International Union of Elevator Constructors Local 5, 538 F.2d 1012, 1019-20 (3d Cir. 1976); United States v. Local 212, International Bhd. of Elec. Workers, 472 F.2d 634, 636 (6th Cir. 1973).

45. 118 CONG. REC. at 7166 (section-by-section analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972, submitted jointly by Sen. Javits and Sen. Williams).

46. 118 CONG. REC. at 1664-65 (statement of Sen. Javits). The decisions cited were United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 172 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

47. 118 CONG. REC. at 7168 (section-by-section analysis of H.R. 1746, the Equal Employment Act of 1972, submitted jointly by Sen. Javits and Sen. Williams).

48. H.R. 1746, 92d Cong., 2d Sess. (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 39, at 326.

provision largely unchanged, while the Senate version eliminated the final sentence from section 706(g).[49] This sentence made clear that the traditional victim-specific limitations on affirmative equitable relief applied in cases brought under title VII.[50] The bill that emerged from the House-Senate conference, and ultimately became law, contained the original final sentence of section 706(g).[51] The significance of this, when combined with the section-by-section analysis of section 706(g), is that Congress most likely intended that title VII remedies be victim-specific and not quota based.[52]

C. *Section 703(h)*

Section 703(h)[53] originated in 1964 because members of Congress were very concerned about the impact which title VII would have on the seniority rights of employees.[54] Senator Hill, chairman of the Senate Labor and Public Welfare Committee feared that "[t]he civil rights bill [would] undermine the freedom of organized labor. . . . It would undermine a basic fabric of unionism, the seniority system."[55] In reply to the assertions made by Senator Hill,

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49. S. 2515, 92d Cong., 2d Sess. (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 39, at 1783.

50. The last sentence of section 706(g) provides:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on the account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

42 U.S.C. § 2000e-5(g) (1976).

51. S. CON. REP. No. 681, 92d Cong., 2d Sess. 5-6, 18-19 (1972); *reprinted in* LEGISLATIVE HISTORY, *supra* note 39, at 1805; H.R. REP. No. 899, 92d Cong., 2d Sess. 5-6, 18-19 (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 39, at 1827.

52. For an excellent overview of the legislative history of section 706(g), see Brief of the United States Intervenor-Appellee, Williams v. City of New Orleans, No. 82-3435 (5th Cir. filed May 22, 1983) (petition for rehearing en banc).

53. Section 703(h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race. . . .

42 U.S.C. § 2000e-2(h) (1976).

54. *See* H.R. REP. No. 914, 88th Cong., 1st Sess. 71-72 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2439-41.

55. 110 CONG. REC. at 486 (statement of Sen. Hill).

Senator Clark submitted a Justice Department memorandum which argued that the proposed title VII would not affect existing seniority rights.[56]

> [I]t has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. *This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.* . . . It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. . . .[57]

The memorandum went on to state that:

> [If] seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.[58]

Senator Clark, in response to Senator Dirksen's concerns over seniority rights, submitted another memorandum which included the following question and answer:

> Question . . . What of dismissals? Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> Answer. Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.[59]

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56. *Id.* at 7206.
57. *Id.* at 7207 (emphasis added).
58. *Id.*
59. *Id.* at 7216-17.

Section 703(h) was eventually adopted as a reflection of the special status that Congress accorded the operation of a last hired, first fired seniority system under title VII. Moreover, Congress made no change in section 703(h) when it revised title VII in 1972.

D. Supreme Court Interpretations of Title VII

The first Supreme Court decision to define the remedial authority of a court in the context of a section 703(h) seniority system was *Franks v. Bowman Transportation Co.*[60] *Franks* involved a claim of unlawful discrimination by a class of minority nonemployee applicants who had unsuccessfully sought employment as over-the-road (hereinafter OTR) truck drivers. The district court found that the employer had engaged in a pattern of racial discrimination in the hiring, transfer and discharge of employees.[61] The district court ordered the employer to give priority consideration to class members for OTR jobs but declined to award back pay or constructive seniority retroactive to the date of individual application.[62] The court of appeals reversed the district court's ruling on back pay, but affirmed its refusal to award retroactive seniority.[63]

The United States Supreme Court held that for actual victims of unlawful discrimination, an award of constructive seniority back to the date of the discriminatory act was an appropriate judicial remedy. The purpose of this award was to restore those victims to their "rightful place." "Rightful place" was defined as "a position where they would have been were it not for the unlawful discrimination."[64] But even in providing that actual victims must receive constructive seniority, the Court took pains to point out that "[n]o claim is asserted that nondiscriminatee employees [who were white] holding OTR positions they would not have obtained but for the illegal discrimination should be deprived of the seniority status they have earned."[65]

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60. 424 U.S. 747 (1976).

61. *Id.* at 751.

62. *Id.*

63. Franks v. Bowman Transp. Co., 495 F.2d 398, 422-23 (5th Cir. 1974).

64. *Franks*, 424 U.S. at 764 (quoting section-by-section analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972, 118 CONG. REC. 7166, 7168 (1972)). *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

65. *Franks*, 424 U.S. at 776. Lower courts have expressly held that the relief for actual discriminatees does not extend to bumping employees presently occupying jobs; victims must wait for vacancies to occur. *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257, 267 (4th Cir. 1976); Local 189, United Papermakers v. United States, 416 F.2d 980, 988 (5th

The constructive seniority rights awarded in *Franks* were not judicially invented rights. Rather, these rights were defined by the existing seniority system itself, once the "rightful place" of each identifiable victim of discrimination was determined. The seniority rights of the innocent, incumbent employees obviously were affected by the constructive seniority remedy. These employees, however, were afforded a substantial measure of protection by being allowed to retain their accumulated seniority that had been obtained in part because of their employer's discriminatory practices. In light of this advantage, the Court felt that it was basically fair to slot victims into the existing seniority system and then allow that system to continue operating as the race-neutral basis for allocating future rights.[66] Thus, the relief in *Franks* preserved rather than abrogated existing rights under bona fide seniority systems, while extending those same rights to identifiable victims of discrimination in order to make them whole.

A year later, in *Teamsters v. United States*,[67] the Court was faced with the need to further address the relationship between seniority systems and the remedial authority of a district court under title VII. In *Teamsters*, the defendant trucking company was found to have engaged in the unlawful practice of excluding minorities from lucrative positions as OTR truck drivers. After affirming the district court's finding of liability under title VII, the court of appeals held that all minority incumbent employees—including those who had never applied for OTR positions—were entitled to bid for future OTR jobs on the basis of their accumulated company seniority.[68] The appeals court further held that each class member who was hired for an OTR position was entitled to an award of retroactive seniority dating back to the class member's "qualification date." This date was defined as when: 1) an OTR driver position was vacant; and 2) the class member met or could have met the job's qualifications.[69]

The Supreme Court reversed the lower court's holding that the trucking company's seniority system was itself subject to attack because it perpetuated the past effects of discrimination. The

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Cir. 1969).

66. *Franks*, 424 U.S. at 764-66.

67. 431 U.S. 324 (1977).

68. The minorities received retroactive seniority even though they never applied for the jobs because the court found that the company's discriminatory practices had discouraged them from applying for available positions.

69. United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 323 (5th Cir. 1975).

Court held that by virtue of section 703(h), a bona fide seniority system does not become unlawful simply because it may perpetuate pre-title VII discrimination. This was because Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees. Thus, the disproportionate advantage given by the seniority system to the nonminority OTR drivers, because of the company's intentional pre-Act discrimination, was sanctioned by section 703(h).[70] The Court then considered how to remedy the other discriminatory employment practices that had been proven by the victims. The Court rejected the trucking company's argument that only individuals who had actually applied for OTR positions could obtain relief under section 706(g). Instead, the Court held that relief in the form of constructive seniority was available to those who could prove that they were both deterred from applying for the position because of the employer's discriminatory practices and that they were qualified for the job.[71] This latter class of plaintiffs, like those who were actually precluded from obtaining the OTR jobs, could show when they presumably would have been employed but for the discrimination. Thus, relief to this class would not require modification of the seniority system itself, but merely the fitting of minorities into their "rightful place" within that system. Minorities who could not make such a showing were not entitled to constructive seniority.

Together, *Franks* and *Teamsters* show that title VII remedies must preserve the seniority rights protected by section 703(h). These rights may be modified only to the extent necessary to place identifiable victims of discrimination in their rightful place in that system. This accommodation serves two very important concerns of equity jurisprudence under title VII: 1) the importance of maintaining the basic seniority system; and 2) the need to be fair to innocent, incumbent employees.

The logic of *Franks* and *Teamsters* was reaffirmed in *Ford Motor Co. v. EEOC*.[72] In this case, the EEOC sued Ford claiming that the company had committed a title VII violation by refusing to hire three women at one of its warehouses. While the suit was pending, Ford offered the women the jobs that they were previously denied, but did not offer seniority retroactive to the date of

70. *Id.* at 348-55.
71. *Id.* at 372.
72. ___ U.S. ___, 102 S. Ct. 3057 (1982).

the alleged discrimination. Although Ford's offer did not require that the women compromise their title VII claims of back pay and retroactive seniority, the women turned down the jobs. Ford argued that since section 706(g) requires that the women use reasonable diligence to mitigate damages,[73] any potential liability for back pay terminated on the date the women declined to take the jobs. The EEOC argued that since the job offers did not include retroactive seniority, the women were under no obligation to accept the jobs. The Court held that if employers were required to offer retroactive seniority to terminate back pay liability, such a rule "encourages job offers that compel *innocent workers* to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination."[74] Foreseeing the possibility that layoffs could occur before the newly hired women's lawsuit was decided, the Court reasoned that:

> [A]n employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that "the large objectives" of [t]itle VII . . . require innocent employees to carry such a heavy burden.[75]

What seems to be emerging from the Court's decisions is the firm rule that a district court in a title VII case may not modify a bona fide seniority system; it can only slot individuals into their rightful place within that system. The effect of these decisions upon *Stotts* is that firefighters who are only nonvictim beneficiaries, and not victims of actual discrimination, have no basis for claiming any seniority in addition to what they have accrued on the job. When the 1974 and 1980 decrees were issued, the district court was without authority to either fire nonminority incumbents and replace them with minority nonvictims, or to award nonvictims constructive seniority. The *Stotts* district court's order insulating a certain percentage of minority firefighters from dismissal under a bona fide seniority system is equivalent to an award of constructive seniority in that it places nonvictim beneficiaries in a position superior to that of innocent incumbents. Since the order

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73. 102 S. Ct. at 3070.
74. *Id.* (emphasis added) (citation omitted).
75. *Id.* (citations omitted).

embraced minority firefighters who were not victims of unlawful employment discrimination,[76] the district court's award of retroactive seniority is indistinguishable—save in its timing—from the award reversed in *Teamsters* and the rationale of *Ford Motor Co. v. EEOC.*[77]

V. CONCLUSION

Supporters of the Civil Rights Act of 1964 were adamant that section 706(g) prohibited class-oriented quota remedies. This position was not altered by the 1972 Equal Employment Opportunity Act's modifications of title VII. Recent Supreme Court decisions seem to be moving toward the original congressional position that section 706(g) was only meant to help the identifiable victims of actual discrimination. If the Court continues this trend, it will surely reverse the Sixth Circuit and hold that the *Stotts* district court exceeded its remedial authority by prohibiting nonvictim minorities from being laid off. If this decision is written broadly, it could call into question the enforceability of any consent decree which utilizes quota remedies.

This movement away from quotas and towards victim-specific remedies will alter the distribution of benefits and burdens of a remedial order. With the continuation of this trend, the four classes identified previously will now be affected in the following ways:

1) *Wrongdoer-Employee*—This class will have to pay a greater price for its discrimination. Forcing wrongdoers to incur backpay liabilities to identifiable victims may not seem like much, but it is certainly an improvement over the Sixth Circuit's nonpunishment. Changing the racial mix of the wrongdoer-employer's work force is not a punishment since the employer is only concerned with whether each employee is qualified for the position.

2) *Victim*—The victims were a forgotten class under the Sixth

76. *Id.* Both the 1974 and 1980 decrees explicitly stated that they did not constitute an adjudication or admission by the City of Memphis of any violation of law. *Stotts*, 679 F.2d at 571.

77. *Cf.* United Steelworkers v. Weber, 443 U.S. 193 (1979). Unlike the voluntary craft training program in *Weber*, the *Stotts* district court's layoff required discharge of senior nonminority employees solely to maintain existing racial percentages. Even in interpreting title VII's prohibitions in a context not involving state action, *Weber* disapproved actions which "unnecessarily trammel the interests of the white employees." 443 U.S. at 208. In contrast to *Stotts*, two of the critical facts in *Weber* leading to the conclusion that the minority training program did not violate title VII were 1) the program did not require the discharge of white workers and their replacement with new minority hires, and 2) the program was not intended to maintain racial balance.

Circuit's ruling. Hiring or promoting nonvictim minorities does nothing to help the actual victims who are unemployed as the result of racial discrimination. The Court's decision should change this forgotten class status by awarding constructive seniority and, hopefully, backpay to identifiable victims.

3) *Nonvictim Beneficiary*—This class was never discriminated against by the wrongdoer-employer, but yet they are receiving benefits (by being hired and promoted) due to the Sixth Circuit's ruling. These undeserved benefits will no longer be conferred.

4) *Innocent Incumbent*—Although this class never discriminated, they received a punishment (loss of their jobs and promotions) from the Sixth Circuit. This punishment should now cease.

The Court now has the opportunity to outline a more equitable system of remedies to heal the scars of past racial discrimination. Such a decision is long overdue and will be welcomed by those who believe that every person should be judged by merit, and not by race.

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